



CURB UPDATE

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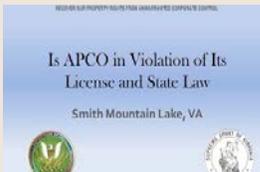


JULY 14, 2017

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VOLUME 3 ISSUE 6

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CURRENT STATUS ... WHAT'S NEXT

Pressls v APCO – Pressls are appealing Judge Reynolds' May 4, 2017 decision to the Va. Supreme Ct. Pressls' appeal will be filed prior to 1 August 2017. The schedule from that point on will be determined by the Va. Supreme Ct. This court has shown prior interest in Smith Mountain Lake, as it has heard three cases: *Brown v Haley* (1987); *Smith Mountain Yacht Club v Ramaker* (2001); and *Anderson v Delore* (2009). Judge Reynolds' ruling is inconsistent with these Va. Supreme Ct. decisions, as well as numerous other easement cases decided by this Court.

The 1987 *Brown v Haley* decision examined the underlying flowage easement, which is in all pertinent parts identical to Pressls easement. The Court construed the flowage easement as follows, "By deed ... Rufus R. Brown and Sallie W. Brown conveyed to Appalachian Power Company (Apco) the right to overflow and affect with water that portion of a tract of 321.75 acres to the 800-foot elevation and to enter below the 800-foot contour and clear the land for the impoundment of water. The deed reserved to the Browns the right to use the land below the 800-foot contour." C.U.R.B. is confident the Va. Supreme Ct. will hear Pressls' appeal.

If the Pressl ruling is allowed to stand, it would violate superior court precedent and basic contract common law. Consequently, every shoreline property owner would be negatively impacted by Judge Reynolds' flawed decision:

(1) "Because the Flowage Easement which governs the rights of the property owners in this case is so broad - it very nearly amounts to a fee interest," [Reynolds] **which is contrary with the above three rulings of the Va. Supreme Ct.**

(2) "APCO is required to operate the project pursuant to its FERC license, which incorporates the SMP, and these documents require APCO to manage the occupancy and use of project property ... The application of the SMP through the flowage easement is a reasonable restriction on the Pressls' property rights for the portion of their property located below the 800-foot elevation contour; and APCO's right to remove structures and improvements below the 800-foot elevation contour at its discretion encompasses the right to permit and approve on a preconstruction basis structures and improvements that would comply with its FERC license and SMP." [Reynolds] **APCO's license obligations to FERC are irrelevant, as neither APCO nor FERC have any federal authority to regulate the private property of others. Judge Reynolds effectively rewrote the flowage easement contract, by adding the SMP and FERC license (amounting to 374 additional pages). No court has the power to do so. Only the parties to the easement (the current landowner and APCO) have the power to amend the agreement.**

APCO v Nissen – Judge Reynolds ruled against the Nissens on June 16, 2017. His reasoning relied upon his Pressl decision. At the time of this newsletter, the judge has not yet published this ruling. Once the ruling is published, the Nissens will have 90 days to file their appeal with the Va. Supreme Ct.

Bedford County Dock Ordinance Amendment – Bedford, Franklin and Pittsylvania counties all comply with Virginia law and will issue building permits for a dock without requiring an approved APCO permit.

Is it possible to build a dock structure that is compliant with APCO's SMP guidelines, without signing a permit and surrender the ownership of your property to APCO's whims? **YES.** Can APCO force a landowner to sign their permit? **NO.** If a dock is compliant and the landowner has not signed APCO's permit, would APCO litigate? **POSSIBLY.** If APCO did elect to litigate they could not argue the dock was not compliant. APCO could argue they must follow the federal license, however, it does not apply to anyone other than APCO. APCO could argue that the landowner violated the easement, but then APCO would have explain why over 6,000 residential docks on the lake are unpermitted, and APCO would have to explain how this dock prevents them from overflowing and generating electricity.

DEEP BACKGROUND – APCO'S ABRUPT REVERSAL ON REGULATION AND PROPERTY RIGHTS

- 1954: Apco buys 5,900 acres near Smith Mountain Gap. Construction plans begin to gel in the late 1950's and APCO spokesmen embark on a public relations campaign to 'sell' the project to locals. In June 1957, James White, APCO's District Engineer, spoke before the Franklin County Board of Supervisors: "*The company proposes to purchase or obtain flowage rights on all land to be flooded. They will probably purchase more land than that was flooded because certain individuals will want to sell their entire farm where large portions are being flooded. ... On the other hand we feel that the remaining property owners will be more than compensated by reason of having the most ideal shoreline for recreational purposes on the entire project.*" (Franklin News Post 20 June 1957)

- August 28, 1958 APCO files an application with the Federal Power Commission for a license to construct Smith Mountain and Leesville dams. 1959: Apco begins buying more land and flowage rights.

- July 1959, APCO employees James Jones and A.R. Martin urge Franklin County to enact zoning regulations to prevent undesirable structures being built that would detract from the value of holdings of other landowners (including, of course APCO's shoreline properties). Jones told supervisors, *"You have two years to do some orderly planning instead of waiting until the last minute to do panic planning as is usually done when people suddenly realize situation that faces them."* (Franklin News Post 3 July 1959)
 - April 25, 1960 APCO is awarded a 50-year license to build and operate Smith Mountain and Leesville dams and power stations. License Article 21 requires, "The Licensee shall, prior to flooding, clear all lands in the bottom margins of the reservoirs to be submerged so that no brush or trees protrude above an elevation of 5 feet below the minimum power pools." (note: Minimum pool is 787-feet)
 - APCO continues to insist that Franklin County establish a planning commission. APCO employee Prince Thornton, becomes its chairman in 1961 and serves until 1967. Under Thornton's leadership the planning commission develops a use map, comprehensive plan and subdivision ordinances to prevent *"shacks and lower-class buildings to be constructed next to more expensive summer homes."* (Franklin News Post 22 Dec 1960)
 - Smith Mountain Lake reaches full-pond in March 1966. Franklin County Commissioner of Revenue reports that a large number of permits were issued each month throughout 1966 for construction of homes, cottages and cabins along the shores of SML. Many permits were also issued for the construction of boat houses and boat ramps. *"Not a month went by in 1966 that we did not issue several permits for construction along the shores of the lake,"* Gravelly remarked. (Franklin News Post 26 Jan 1967)
 - During the 1970's APCO buys up more shoreline land to assemble into larger tracts, which they sell for millions of dollars in profit. APCO sells these larger tracts with rights to build boat docks. (Roanoke Times 8 Jan 1989, APCO Staff Profited on Lake Deals.)
 - February 17, 1998 FERC amends APCO's 1960 license to require regulation of docks and uses along the shoreline. APCO fails to inform FERC the 1960 flowage easements do not grant APCO rights to regulate shorelines. FERC never verifies that APCO holds the necessary property rights.
 - Between 1960 and 2003, for some 43 years no one including FERC and APCO, questioned the right of lakefront property owners to construct and maintain docks, stabilize shorelines, remove/plant vegetation or use the easement land in any manner not inconsistent with APCO's rights to clear for the impoundment of water and overflow shoreline property.
 - August 3, 2003 APCO publishes its Shoreline Management Plan, which FERC approves in July 2005. However, APCO did not begin inspection and enforcement of SMP regulations until FERC issued the results of its special compliance inspection in January 2008. In its 2003 SMP APCO estimated that there were over 6,400 residential docks on SML and LVL, all constructed absent any APCO regulation. Today approximately 84% of all residential docks on SML and 67% of all residential docks on LVL were constructed absent any APCO regulation.
- Conscience is our human fail-safe, preventing corrupt ideas from becoming corrupt actions. People without conscience never consider the consequences of their corrupt acts upon others. Corporations, however, are not human and consequently often commit corrupt acts, without remorse. Such is the case with APCO and its complete reversal on regulation and property rights under its flowage easements. Reneging upon company promises and legal commitments made in the early days of project conception and construction, is an unconscionable act of deception.

C.U.R.B. CONTRIBUTIONS CAN BE MAILED TO:

81 LIGHTHOUSE LN MONETA, VA 24121-1991



ELIMINATE IGNORANCE – Before you agree to sign any APCO's property stealing revocable permits, at least read the permit and your flowage easement. Seek the professional advice of a competent attorney. We know several. Be patient, vigilant and stay informed. For a more in-depth understanding, we recommend viewing the following CURB videos:

[Your Flowage Easement](#) [APCO's Dock Permit](#) [History of Regulation](#) [What Did APCO Permit](#)

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